Francis Joseph Puthucheary v Eng Securities Sdn Bhd & Anor

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22–579 OF 2000
GHAZALI CHA J
27 JANUARY 2011

Tort — Conversion — Manipulation of plaintiff's trading account by second defendant — Sale of plaintiff's CDS account by second defendant without plaintiff's authority — Issues of liability — Whether second defendant committed act of conversion — Whether first defendant facilitated the conversion — Whether first defendant breached its duty to plaintiff — Whether second defendant agent of first defendant — Whether first defendant vicariously liable for tort committed by second defendant — Whether plaintiff contributed to conversion — Whether plaintiff succeeded in proving its case against defendants

The plaintiff, an advocate and solicitor, had opened an account with the first defendant, a licensed stock broking firm and as his authorised remisier. The second defendant was a (commissioned) dealer's representative with the first defendant. The first and the second defendants would share the commission from the sale and purchase of shares transacted by the second defendant for his various clients. The plaintiff complained to the first defendant about the manipulation of his trading account by the second defendant. The plaintiff had also lodged a police report, inter alia, stating that the second defendant had taken the share scripts with the transfer form from the first defendant without his authority and took the money. The plaintiff also alleged that other shares in the plaintiff's CDS account were sold by the second defendant without his authority. The plaintiff's claim against the first and the second defendants were as follows: (i) alteration of the plaintiff's address for his trading account and CDS account; (ii) manipulation of the plaintiff's accounts and carrying out unauthorised trades and the unlawful act of short selling; (iii) the plaintiff was provided with falsified letters and account printouts to deceive the plaintiff into believing that his accounts were properly managed; and (iv) the first defendant breached its statutory obligations under s 16 of the Securities Industry Act 1983 ('Act') by representing to the plaintiff that the second defendant was of good character and reputation. The first and the second defendants defined the plaintiff's claims. The first defendant had counterclaimed against the plaintiff for the amount outstanding to the first defendant on the plaintiff's trading account. Further, the first defendant had sought an indemnity against the second defendant in the event the first defendant was found liable to the plaintiff. The second defendant had filed the defence against the first defendant's claim for indemnity. The issues for the determination of this court, inter alia, were as follows: (i) whether or not the second defendant was an agent

of the first defendant; (ii) whether the first defendant was vicariously liable to the act of the second defendant; (iii) whether the plaintiff's claim could be sustained in view of the fact that the same was subrogated to Bursa Saham Malaysia after the plaintiff received compensations in respect of his claim.

Held, allowing the plaintiff's claims with costs:

(1) The second defendant was acting as the agent for the first defendant. The first defendant had clearly facilitated the conversion of the plaintiff's shares in breach of its duty to the plaintiff (see para 13(a)(iii)).

(2) The first defendant had failed to discharge the duty of care to the plaintiff as a client/customer in the following manner: (a) failed to advise the plaintiff not to handover any script together with the transfer forms to the dealer's representative pending or whilst the migration process was conducted by the first defendant for his clients; (b) the first defendant's conduct in allowing the second defendant to change the plaintiff's address with the first defendant and with MCDS without verifying the particulars stated in the application form with the plaintiff and without ensuring the plaintiff was present, in breach of various rules; (c) There were various short selling of shares in the plaintiff's account and the first defendant merely accepted through a junior officer the explanation of the second defendant without any verification from the plaintiff. This had facilitated the second defendant to continue such conduct; (d) the first defendant provided the plaintiff with the letters and account printouts with falsified entries to deceive the plaintiff into believing that his account and CDS account were being properly managed; (e) the first defendant had misrepresented to the public at large including the plaintiff in particular to the Securities Commission that the second defendant was of a good character and reputation despite the fact that he was charged and convicted of the offence of short selling (see para 14).

(3) Since the second defendant was the agent for the first defendant, therefore the first defendant was vicariously liable. Section 2 of the Act does not make any difference between dealer's representative and commissioned dealer's representative (see para 15).

(4) The plaintiff had accepted the compensation fund on the condition that he will be allowed to proceed with his claims and reimburse the compensation fund that he received from Bursa Saham Malaysia to Bursa Malaysia. Therefore, there was no intention of double recovering nor misleading anyone by the receipt of the RM200,000 (see para 16).

[Bahasa Malaysia summary

Plaintif, seorang peguambela dan peguamcara, telah membuka akaun dengan defendan pertama, firma broker saham dan remisiernya yang diberi kuasa. Defendan kedua adalah (commissioned) wakil peniaga dengan defendan

pertama. Defendan pertama dan kedua akan berkongsi komisen daripada jual beli saham yang ditransaksi oleh defendan kedua bagi berbagai pelanggannya. Plaintif di sini mengadu kepada defendan pertama mengenai manipulasi akaun niaganya oleh defendan kedua. Plaintif juga membuat laporan polis, antara lain, menyatakan bahawa defendan kedua telah mengambil skrip saham bersama dengan borang pemindahan daripada defendan pertama tanpa kuasanya dan mengambil wang tersebut. Plaintif juga mendakwa bahawa saham-saham lain di dalam akaun CDS plaintif dijual oleh defendan kedua tanpa autoritinya. Tuntutan plaintif terhadap defendan pertama dan kedua adalah seperti berikut: (i) pengubahan alamat plaintif bagi akaun niaganya dan akaun CDSnya; (ii) manipulasi akaun plaintif dan melakukan dagangan yang tidak diluluskan dan *short selling* yang tidak sah; (iii) plaintif diberikan surat dan cetakan akaun yang dipalsukan untuk menipu plaintif mempercayai bahawa akaunnya diuruskan dengan baik; dan (iv) defendan pertama telah memungkiri kewajipan statutorinya di bawah s 16 Akta Perindustrian Sekuriti 1983 ('Akta')dengan merepresentasi kepada plaintif bahawa defendan kedua mempunyai perwatakan dan reputasi yang baik. Defendan pertama dan kedua menjelaskan tuntutan plaintif. Defendan pertama menuntut balas terhadap plaintif bagi jumlah tertunggak kepada defendan pertama atas akaun niaga plaintif. Selanjutnya, defendan pertama memohon indemniti terhadap defendan kedua jika defendan pertama didapati bertanggungjawab terhadap plaintif. Defendan kedua memfailkan pembelaan terhadap tuntutan defendan pertama untuk indemniti. Isu untuk dipertimbangkan oleh mahkamah ini, antara lain, adalah seperti berikut: (i) sama ada defendan kedua adalah ejen kepada defendan pertama; (ii) sama ada defendan pertama bertanggungjawab secara vikarius bagi tindakan defendan kedua; (iii) sama ada tuntutan plaintif boleh dikekalkan memandangkan fakta bahawa ia telah disubrogasi kepada Bursa Saham Malaysia selepas plaintif menerima pampasan berkaitan dengan tuntutannya.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Defendan kedua bertindak sebagai ejen defendan pertama. Defendan pertama jeas membantu pemindahan saham-saham plaintif dalam pelanggaran kewajipannya kepada plaintif (lihat perenggan 13(a)(iii)).

(2) Defendan pertama telah gagal melepaskan kewajipan berjaga-jaga terhadap plaintif sebagai pelanggan secara yang berikut: (a) gagal menasihatkan plaintif untuk tidak memberikan apa-apa skrip bersama-sama dengan borang pemindahan kepada wakil niaga sementara atau semasa proses migrasi dilakukan oleh defendan pertama bagi pelanggan-pelanggannya; (b) tindakan defendan pertama dalam membenarkan defendan kedua menukar alamat plaintif dengan defendan pertama dan dengan MCDS tanpa menentusahkan butir-butir yang dinyatakan di dalam borang permohonan dengan plaintif dan tanpa memastikan plaintif hadir, dengan melanggar berbagai peraturan; (c)

terdapat berbagai *short selling* saham di dalam akaun plaintif dan defendan pertama semata-mata menerima melalui pegawai baru penjelasan defendan kedua tanpa apa-apa pengesahan daripada plaintif. Ini membantu defendan kedua meneruskan tindakan tersebut; (d) defendan pertama memberikan plaintif surat-surat dan cetakan-cetakan akaun dengan pemasukan yang dipalsukan untuk menipu plaintif mempercayai bahawa akaunnya dan akaun CDS diuruskan secara wajar; (e) defendan pertama salah nyata kepada umum termasuk plaintif khususnya kepada Suruhanjaya Sekuriti bahawa defendan kedua mempunyai perwatakan dan reputasi yang baik walaupun pada hakikatnya dia dituduh dan disabitkan dengan kesalahan *short selling* (lihat perenggan 14).

(3) Oleh sebab defendan kedua merupakan ejen defendan pertama, dengan itu defendan pertama bertanggungjawab secara vikarius. Seksyen 2 tidak membuat apa-apa perubahan di antara wakil peniaga dan wakil peniaga dilantik (lihat perenggan 15).

(4) Plaintif telah menerima dana pampasan atas syarat bahawa dia dibenarkan untuk meneruskan dengan tuntutannya dan membayar semula dana pampasan yang diterimanya daripada Bursa Saham Malaysia kepada Bursa Malaysia. Dengan itu, tidak ada niat untuk mendapatkan dua kali atau menipu sesiapa dengan penerimaan RM200,000 (lihat perenggan 16).]

Notes

For cases on conversion in general, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 84–149.

Cases referred to

Associated Asian Securities Pte Ltd v Lee Kam Wan [1993] 1 SLR 585, CA (refd)
Chien Chung Ming v Kay Hian & Co Pte & Anor [1992] 4 CLJ 366, HC (refd)
Hamizan bin Abd Hamid v Wong Kok Keong & Anor [1994] 3 MLJ 630; [1994] 4 CLJ 122, HC (refd)
Karthiyayani v Lee Leong Sin & Anor [1975] 1 MLJ 119, FC (refd)
Tan Kim Khuan v Tan Kee Kiat (M) Sdb Bhd [1998] 1 MLJ 697, HC (refd)

Legislation referred to

Capital Markets and Services Act 2007 s 154
Rules of the High Court 1980 O 14A
Securities Industry Act 1983 ss 2, 16, 44, 45, 79

(Puthucheary) for the plaintiff.
(Balvinder Singh Kenth) for the first defendant.

Ghazali Cha J:

[1] The plaintiff, an advocate and solicitor, opened an account (No NBF002) on 18 November 1992 with the first defendant as his authorised remisier.

[2] The first defendant was at all material times a licensed stock broking firm operating in Johor Bahru. The first defendant's business included the trading of stocks and shares listed on the KLSE (now Bursa Saham Malaysia).

[3] The second defendant was a (commissioned) dealers representative with the first defendant. According to the evidence of SDI the second defendant was never the employee of the first defendant. SDI said further that the second defendant had entered into a remisiership agreement with the first defendant on 14 October 1994.

[4] The second defendant and first defendant would share the commission from the sale and purchase of shares transacted by the second defendant for his various clients.

[5] In or about early September 1997 the plaintiff came to the first defendant's office to complain about his trading account had been manipulated by the second defendant.

[6] On 30 September 1997, the plaintiff lodged a police report stating that he had purchased numerous shares through the first defendant's representative and the second defendant had taken the share scripts with the transfer form from the first defendant without his authority and took the money. The plaintiff also alleges that other shares in the plaintiff's CDS account were sold by the second defendant without his authority.

[7] The plaintiff's claim against the first and second defendants are as follows:

(a) fraudulently and/or unlawfully altering the plaintiff's address for his Trading account and CDS account;

(b) fraudulently and/or unlawfully manipulated his accounts and carrying out unauthorised trades and the unlawful act of short selling;

(c) fraudulently and/or unlawfully providing the plaintiff with falsified letters and account printouts to deceive the plaintiff into believing that his account were properly managed;

(d) the first defendant in breach of its statutory obligations under the s 16 of the Securities Industry Act 1983 represented to the plaintiff that the second defendant was of good character and reputation;

(e) breach of duties as fiduciary and/or agents;

(f) breach of contract; and

(g) breach of duties under common law and statute.

[8] The first defendant has filed a defence and counterclaim against the plaintiff's claim in its entirety and counterclaiming for the amount outstanding to the first defendant on the plaintiff's trading account. Further, the first defendant filed a notice seeking indemnity against the second defendant in the event the first defendant is found liable to the plaintiff.

[9] The second defendant filed a defence denying the plaintiff's claim in its entirety and put the plaintiff to strict proof thereof. The second defendant also filed a defence against the first defendant's claim for indemnity.

[10] On 12 October 2006, parties informed the court that by agreement, the issues of liability is to be decided first and the issue of quantum, if it arises, will be brought before Senior Assistant Registrar of the High Court.

[11] At the conclusion of the trial, parties have submitted on a preliminary issue as to whether the plaintiff's claim can be sustained in view of the fact that the same is subrogated to Bursa Saham Malaysia after the plaintiff received compensations in respect of his claim (refer to application filed by bthe first defendant under O 14A of the RHC). Oral submission for this application was made on 3 December 2010 before this court.

BURDEN OF PROOF

[12] In *Tan Kim Khuan v Tan Kee Kiat (M) Sdb Bhd* [1998] 1 MLJ 697 … Augustine Paul J (as he then was): 'It is settled law that the burden of proof rests throughout the trial on the party on whom the burden lies. Where a party on whom the burden of proof lies has discharged it, then the evidential burden shifts to the other party. What shifts is the responsibility of adducing evidence to discharge that burden. When the burden shifts to the other party (the defendant), it can be discharged by cross-examination of witnesses of the other party on whom the burden of proof lies or by calling witnesses or by giving evidence himself or by a combination of different methods if the defendant does not adduce any evidence when the burden has shifted to him, he will fail.'

[13] It is the plaintiff's submission that first defendant has breached the following obligations and duties owed by it to the plaintiff:

(a)

(i) Duties and obligation as agents to the plaintiff. The plaintiff contends that the first defendant as the agent for the plaintiff has fiduciary duties to ensure that the plaintiff's shares were kept safely and on trust for the plaintiff.

(ii) An important issue to be decided is whether the second defendant is an agent of the first defendant. DWI in his evidence told the court that the second defendant is only an independent commissioned dealer's representative. He was never an employee of the first defendant. The first defendant does not assign any clients to the second defendant for purposes of trading shares. He sources for his own clients. The plaintiff was known to the second defendant prior to the trading account being opened. Therefore the nature of the relationship between them, necessarily implies one of principal and agent in the buying and selling of shares. The first defendant plays no part in the receipt of instructions and is not privy to the same, the second defendant, according to the first defendant's solicitor cannot be called an agent of the first defendant when he buys and sells shares upon the instructions of the plaintiff (refer to the case of *Banque Nationale de Paris vs Tan Nancy & Ors*). Therefore the plaintiff according to first defendant's counsel is liable for any losses incurred in the transactions; and the first defendant would not be liable for the same.

(iii) The plaintiff in reply, refers to cl 3 of the recital of the remisier's agreement dated 14 October 1994 provides that:

> At the request of the Remisier the Company has agreed to appoint the Remisier as its agent for carrying on the business of dealing in securities upon the terms and subject to the condition hereinafter appearing.

Clause 1 of the remisier's agreement dated 14 October 1994 provides that:

> In consideration of the premises and the agreements and conditions hereinafter contained and on the part to be performed and observed by the Remisier, the Company hereby appoints the Remisier as its agents for carrying on the business of dealing in securities from 14 October 1994 and shall thereafter continue until this Agreement.

Act

Section 2 of the Act provides that:

> 'dealer' means a person who carries on a business of dealing in securities as a corporation whether or not he carries on any other business, but does not include an exempt dealer.

'dealer's representative' means a person, by whatever name described, who is in the employment of, or acting for or by arrangement with, a dealer, not being an exempt dealer, and performs for that dealer any of the functions of a dealer other than work ordinarily performed by accountants, clerks or cashiers.

'dealing in securities' means, whether as principal or agent;

(a) acquiring, disposing of, subscribing for or underwriting, securities, or

(b) making or offering to take with any person, or inducing or attempting to induce any person to enter into or to offer to enter into —

(i) any agreement for or with a view to acquiring, disposing of, subscribing for, or underwriting securities; or

(ii) any agreement, other than a future contract, the purpose or avowed purpose of which is to secure a profit to any of the parties from the yield of securities or by reference to fluctuations in the value of the securities.

Case Laws

In *Chien Chung Ming v Kay Hian & Co Pte & Anor* [1994] 3 MLJ 630; [1992] 4 CLJ 366 the High Court held that:

At p 371

The first defendant is therefore liable for the fraud committed by the second defendant. 'An act of an agent within the scope of his actual or apparent authority does not cease to bind his principal merely because the agent was acting fraudulently and in furtherance of his own interest. 'Boustead on Agency (15th Ed), at p 279. It is to be noted that even after the first defendant became aware of the second defendants wrong doings the first defendant chose not to acquire into the ownership of the shares sold on the instructions of the second defendant. The first defendant then set off the sale proceeds against the debts due from the second defendant or her other clients thereby furthering their own interest.

At p 373

It was plain that where a remisier permitted a servant to represent himself as having authority, and, with knowledge that the servant was doing so, accepted the benefit of what the servant had done, then the holding out of himself by the servant as having authority was a holding out for which the master was responsible.

In *Associated Asian Securities Pte Ltd v Lee Kam Wan* [1993] 1 SLR 585 at p 588 the Singapore Court of Appeal held that:

> In this case, the factual background as found by the learned judge was this. At this material time, the appellants were a member of the stock exchange and the respondent a remisier. A remisier is licensed by the stock exchange and to trade in securities but he has to trade through a member firm of the stock exchange … The relationship of a remisier with the member firm I therefore merely that of agent and principal.
>
> It is in the context of this factual background that the terms of the contract between the respondent and appellants ought to be construed. The contract was obviously intended to regulate the dealing of securities by the respondent in the appellant's company and to safeguard the interest of the appellants in relation to such dealing, as the appellants would be vicariously responsible for the performance of all contracts the respondent had put through for his clients.

The plaintiff's solicitor also refers to case: *Chien Chung Ming vs Ky Hian & Co Pte & Anor* [1994] 3 MLJ 630; [1992] 4 CLJ 366.

I therefore accept the plaintiff's solicitor's submission that the second defendant was acting as the agent for the first defendant. The first defendant has clearly facilitated the conversion of the plaintiff's shares all in breach of its duty to the plaintiff.

(b) Implied duties and obligations pursuant to the contract between the plaintiff and the first defendant, on this issue the plaintiff's solicitor submits that the first defendant to deal with the plaintiff's shares and when instructed by the plaintiff and to pay the plaintiff all the proceeds received from the sale of the plaintiff's shares. The first defendant further has duty to hold the plaintiff's shares as a bailee for reward and safeguard the same and the moneys from any loss.

(c) The first defendant also is obliged under common law to take reasonable care to ensure that the plaintiff's shares and moneys are secured and to avoid any misappropriation of the plaintiff's shares and moneys by its agent, the second defendant.

(d) The first defendant, according to the plaintiff's counsel, owed various duties and obligation under the statute to the plaintiff ie under ss 44 and 45 of the Securities Industry Trading Act 1983.

[14] It is my observation that the first defendant has failed to discharge the duty of care to the plaintiff as a client/customer in the following manner:

(a) Failed to advise the plaintiff not to handover any script together with the transfer forms to the dealer's representative pending or whilst migration process is conducted by the first defendant for his clients.

(b) The first defendant's conduct in allowing the second defendant to change the plaintiff's address with the first defendant and with MCDS without

verifying the particulars stated in the application form were correct with the plaintiff and without ensuring the plaintiff was present is in breach of various rules.

(c) There were various short selling of shares in the plaintiff's account and the first defendant merely accepted through a junior officer the explanation of the second defendant without any verification from the plaintiff. This had facilitated the second defendant to continue such conduct.

(d) The first defendant provided the plaintiff with the letters and account printouts with falsified entries to deceive the plaintiff into believing that his account and CDS account were being properly managed.

(e) The first defendant has misrepresented to the public at large including the plaintiff in particular to the Securities Commission that the second defendant was a good character and reputation despite the fact that he was charged and convicted of the offence of short selling.

[15] Whether the first defendant vicariously liable to the act of second defendant? It is my finding that since the second defendant is the agent for the first defendant, therefore the first defendant is vicariously liable, s 2 of the Act does not make any difference between dealer's representative and commissioned dealer's representative (see *Karthiyayani v Lee Leong Sin & Anor* [1975] 1 MLJ 119 at p 122).

[16] Whether by accepting the compensation fund in the sum RM200,000; the plaintiff is now subrogated all his entire claim amounts to in the excess of 2.5m to Bursa Saham Malaysia and is unable therefore to maintain his claim? This argument was in fact not pleaded in the first defendant defence. Therefore the plaintiff submits that it should be rejected. In any event, the plaintiff had accepted the compensation fund on the condition that he will be allowed to proceed with his claims and reimburse the compensation fund that he received from Bursa Saham Malaysia to Bursa Malaysia. Therefore according to the plaintiff's solicitor there is no intention of double recovering nor misleading anyone by the receipt of the RM200,000.

[17] With regard to the application filed by the first defendant under O 14A of the RHC, I am of the opinion that this application was made at a very late stage. The first defendant has waited more than five years to file the application even thought the facts regarding the compensation were within their knowledge before the trial began. Therefore it is clearly an attempt made by the first defendant to defeat the purpose of speedy trial and amounting to an abuse of process of court too. And therefore the application should be dismissed with costs.

[18] Provisions of s 79 of the Securities Industry Act 1983 which was referred to by the defendant's solicitor which is now superseded by s 154 of the Capital Markets and Services Act 2007 was formulated to avoid a claimant being enriched unjustly and to prevent him from making a double claim. The plaintiff in this case has in fact agreed to reimburse Bursa Malaysia Securities Bhd the monies paid to him out of the compensation fund upon recovering the same from the first defendant where Bursa Malaysia has agreed when Bursa decided to pay him the said compensation in lieu of the said undertaking made by the plaintiff. Thus the purpose and objective behind the relevant sections are not in any way defeated.

[19] The other issue to be decided is about the contributory negligence. It is trite law that contributory negligence and particulars of the same must be specifically pleaded in the defence in order for the first defendant to rely on. Case *Hamizan bin Abd Hamid v Wong Kok Keong & Anor* [1994] 3 MLJ 630; [1994] 4 CLJ 122. Counsel for the first defendant submitted that the contributory negligence was pleaded in para 18 of the first defendant's statement of defence. After a careful consideration of para 18, I had failed to see such plea was pleaded by the first defendant. Therefore that argument should be rejected.

[20] The plaintiff in this case cannot be found careless in regards to the shares owned by him as the plaintiff is entitled to treat the first defendant and second defendant as honest businessmen or professionals. Therefore to suggest that the plaintiff was not concerned of the shares worth of millions is without any basis or merits.

IN CONCLUSION

[21] Having considered all the evidence adduced in this case, I found that the plaintiff has proved his case on the balance of probability that the second defendant has committed a tort of conversion of the plaintiff's shares. The plaintiff also has on the balance of probabilities proved his claims against the first defendant that the first defendant has breached various duties of care that he owed to the plaintiff thus facilitating the second defendant to commit such act of conversion and the first defendant is hereby vicariously liable for the tort committed by the second defendant.

[22] The plaintiff's claims hereby allowed with costs and a date to be fixed by the Deputy Registrar of the High Court for assessment of damages. Further I order that the first defendant counterclaim against the plaintiff is dismissed with costs and the first defendant's claim for indemnity against the second defendant is allowed with costs.

Plaintiff's claims allowed with costs.

Reported by Ashgar Ali Ali Mohamed.